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No._____

In The

Supreme Court of the United States

October Term, 1994

RICHARD BARRETT,

Petitioner

vs.

THE MISSISSIPPI BAR,

Respondent

On Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Is an attorney entitled to due process of law under the Fourteenth Amendment or under traditional notions of fair play so as to be afforded some reasonable time limitation upon the bringing of ethics charges against him, particularly when trial is not had until after some nine years?

2. Is Rule 8.1 of the *Rules of Discipline for the Mississippi State Bar (1984)* unconstitutional on its face or as applied under the due process and equal protection clauses of the Fourteenth Amendment?

3. Is Rule 26 of the *Rules of Discipline for the Mississippi*

State Bar (1984) unconstitutional on its face or as applied under the due process and equal protection clauses of the Fourteenth Amendment?

PARTIES BELOW

The Mississippi Bar

Richard Barrett

CASES BELOW

The original case was *Mississippi State Bar v. Richard Barrett*, Complaint No. 82-31-1 (1982). The appeal below is *Richard Barrett v. The Mississippi Bar,* No. 92-BA-00336 (1994).

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On Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner, Richard Barrett, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi in this matter.

OPINION BELOW

The ruling of the Supreme Court of Mississippi from which certiorari is sought is contained in the case styled *Richard Barrett v. The Mississippi Bar*, at the Appendix, dated July 21, 1994, which issued a public reprimand to an attorney. Although the ruling affirmed a ruling by a complaint tribunal, the proceeding in the Supreme Court is regarded as having the effect of an *ab initio* matter.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 *USC* §1257(3).

RELEVANT STATUTORY PROVISIONS

The Fourteenth Amendment, §1, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 8.1 of the *Rules of Discipline for the Mississippi State Bar (1984):*

Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, unless extended by the Court on motion of either party for good cause shown.

Rule 26 of the *Rules of Discipline for the Mississippi State Bar (1984):*

References to time within these rules and procedural sections are directory and not jurisdictional. Time limitations are administrative, not jurisdictional; however, the time for filing appeals or seeking reinstatement shall be jurisdictional. Failure to observe directory time interval may result in

contempt of the agency having jurisdiction but will not justify abatement of any disciplinary investigation or proceeding.

SUMMARY OF THE ARGUMENT

An important issue is presented not only of the court's supervision of attorneys and the overall administration of justice, but of the public's interest and confidence in the judicial system, together with the rights and responsibilities of members of the bar.

An attorney, no less than any other citizen, is entitled to due process of law and fundamental fairness. This Court has recently recognized the practice of law as a being "fundamental right." When a charge of ethical violation is brought against an attorney, the accused may not necessarily be subject to the strict "speedy trial" constraints of a criminal proceeding; however, some reasonable time limits should prevent an unlimited or arbitrary delay in bringing the case to trial. A delay of some nine years violates due process under the Fourteenth Amendment as well as derogates traditional notions of fair play. Violation of its own rules by Respondent, as well as the rules' own patent arbitrariness on their face or as applied by Respondent, further compound the unconstitutionality at hand.

STATEMENT OF THE CASE

On July 29, 1982, Respondent filed an ethics' complaint against Petitioner alleging that on March 3, 1982 Petitioner had brought an emancipation proceeding in behalf of a father and daughter, in one county, while a guardianship was pending in another county, without advising the court. Petitioner answered that the purported guardianship was void *ab initio* as having been established without notice to the parent or daughter, and that, consequently, no notice was required thereof; that the only issues germane to the proceeding were the residency of the

minor and the minor's ability to act as an adult; and that, in any event, Petitioner acted according to law or in good faith pursuant to *ABA Code of Professional Responsibility,* Canon 7, EC 7-4 (1982).

On December 5, 1988, Respondent filed a "formal" complaint against Petitioner. On March 26, 1990, Petitioner filed a motion to dismiss alleging lack of speedy trial. The Motion was overruled on May 1, 1990. On May 14, 1990, Petitioner filed an Emergency Petition for Interlocutory Appeal with the Mississippi Supreme Court alleging lack of speedy trial. The Petition was overruled on June 6, 1990. On May 23, 1990, a hearing was scheduled, but was adjourned by the Court, on grounds of Petitioner's illness, over objections of Petitioner who refused to ask for a continuance, alleging that he wished to preserve his objections to lack of speedy trial. On April 2, 1991, Petitioner filed a Motion To Dismiss, again alleging lack of speedy trial. The Motion was overruled on April 26, 1991.

On May 3, 1991, the cause was tried and judgment entered that Petitioner should be issued a public reprimand. The case was appealed to the Mississippi Supreme Court on April 8, 1992. On July 21, 1994, the Mississippi Supreme Court affirmed the reprimand; two justices dissented on the grounds that Petitioner had been denied due process and fundamental fairness due to the nine-year, lengthy delay in bringing the case for trial.

REASONS FOR GRANTING THE PETITION

PROPOSITION

AN ATTORNEY IS ENTITLED TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OR UNDER TRADITIONAL NOTIONS OF FAIR PLAY SO AS TO BE AFFORDED SOME REASONABLE TIME LIMITATION UPON THE BRINGING OF ETHICS CHARGES AGAINST HIM, PARTICULARLY WHEN TRIAL IS NOT HAD UNTIL AFTER SOME NINE YEARS.

Threshold questions are: Is the issue of due process for attorneys accused of ethical violations of sufficient importance to warrant consideration by this Court? It would seem so, given that the practice of disciplining attorneys is widespread and essential to the overall administration of justice.

Are attorneys, then, entitled to due process in ethics' proceedings? Although disciplinary proceedings have been left largely to the states,[1] this Court has, on occasion, exercised its supervision to assure that constitutional protections have been afforded, as need be. For instance, less than ten years ago, the practice of law was held to be a fundamental right, *cf. Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985) (under the privileges and immunities' clause).

What, then, would be the extent of due process projections, if due process is afforded to accused attorneys? The authorities below are not uniform and this Court has not heretofore spoken on the issue of time limits respecting the bringing and trying of

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[1] Mississippi, for instance, did not allow a lawyer to confront witnesses against him in an ethics' proceeding until 1986, *Attorney K v. Mississippi State Bar,* 491 So.2d 220 (Miss.1986) (Petitioner, here, was counsel in that case and secured the extension of due process rights).

ethics' charges.

Ethics' charges are not "criminal" in the sense that the accused attorney is not facing jail; however, the accused's reputation, livelihood and good name are property and liberty considerations bound up in Fourteenth Amendment protections,[2] or should be, the same as any other accused citizen. As Justice McRae, dissenting, below, observed, there is nothing in the federal constitution by which an attorney loses the right afforded to all when he takes the oath to practice law [A. 33].

Here, the Court is presented a delay of some nine years from the time a charge was made and trial had.

Justice Lee, dissenting, below, suggests that due process and fundamental fairness[3] require dismissal of cases fraught with an unreasonable delay [A. 30]. Justice McRae, dissenting. below, suggests that there must be a showing and finding for "good cause" for any delay, with the complainant having the burden of going forward,[4] and that absent such a showing and finding, the the accused is necessarily prejudiced, requiring dismissal of the proceeding [A. 32].

It is not disputed that the statutory period for trying cases was exceeded. The ruling below indicated that the violation of Rule 8.1 was tantamount to harmless error, but the result is that

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[2] For instance, constitutional projections are said to extend to a public servant when law affecting his employment is patently arbitrary, *Slochower v. Board of Higher Ed. of City of New York,* 350 U.S. 551 (1956), reh. denied 351 U.S. 946 (1956).

[3] See, for the fair play rationale, e.g. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957).

[4] The complainant in both civil and criminal cases generally always has the burden of proof.

there is no statute of limitations, as a result, no time limits and no restraints whatsoever on prosecutions, a process unabashedly – and, it is submitted, patently arbitrarily – approved by Rule 26.[5]

The cases indicate various rationales on the issue of "speedy trial." Even those rejecting a Sixth Amendment "speedy trial" approach rights, generally offer some relief to the accused. Some of the rationales are:

Laches: The length of time in bringing the charges, as well as the period during which the charges were filed, is sufficient, without more, to dismiss the proceedings. *People ex rel. Colo. Bar Ass'n. v. Tanquary,* 48 Colo. 122, 109 P. 260 (1910) (eight and a half years held as too long); *Tenn. Bar Assoc. v. Berke,* 48 Tenn.App. 140, 344 S.W.2d 567 (1960) (nine and a half years held too long, case dismissed for laches); *Arden v. State Bar of Calif.*, 52 Cal.2d 310, 341 P.2d 6, 12 (1959) (case "hanging over the head" of the accused lawyer for three years held too long a period to prosecute ethics' charges).

Staleness: Over an undue period of time, cases have grown stale and must be dismissed. *Columbus Bar Assoc. v. Tedford,* 6 Ohio St.2d 253, 217 N.E.2d 872, 873 (1966); *State ex rel. Neb. State Bar Assoc. v. Richards,* 165 Neb. 80, 84 N.W.2d 136, 143 (1957). *In Re Smith,* 73 Kan. 743, 85 P. 584, 586 (1906).

Prejudice: A showing of prejudice, where time limits are exceeded, can result in dismissal for undue delay of the proceedings, *State Grievance Committee v. Rozbick,* 558 A.2d 989, 991 (Conn.1989); *In Re Charges of Unprofessional Conduct Against NP,* 361 N.W.2d 386, 393 (Mich.1985), app'l dism. 474

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[5] The rule specifies that violation of time-limitations "will not justify abatement of any disciplinary investigation or proceeding."

U.S. 976 (1985); *Attorney Grievance Committee v. Kahn,* 431 A.2d 1336, 1352 (Md.1981).

"Actual" Prejudice: While not dismissing a cause because a deadline has passed, a showing of actual prejudice is suggested could result in a due process violation, *In the Matter of Williams,* 513 A.2d 793, 797 (D.C.1986).

Fault: If there is undue delay, the case might not be dismissed if the delay was attributed to the accused, rather than to the prosecution, *In the Matter of Posner*, 339 A.2d 657, (Md.1975), cert. den. 425 U.S. 1016 (1975). Seemingly, however, the converse implication might be true: a case would be dismissed if the fault for delay was not the accused's; this "burden of proof" rationale is suggested by Justice McRae, dissenting, below.

No speedy trial defense at all: Although standing somewhat isolated, *In the Matter of O'Hara,* 408 N.Y.S.2d 70, 71 (N.Y.1978) holds that there are no speedy trial rights in any sense at all. The majority holding, below, would seemingly place Mississippi in this category, as well.

In the 1982 emancipation proceeding in which the original ethics' complaint arose, the father and daughter were the parties and, as such, would have been material witnesses in the grievance defense. They were present, willing and able to testify for many years, but by trial had left the jurisdiction and could not be subpoenaed.[6] They could have rebutted any prosecution witnesses or attested to the state of mind of Petitioner (a key element of the defense being the "good faith" of Petitioner). Earlier cases suggest that the inability of an attorney to secure witnesses which were available at an earlier time, resulting from an unreasonable delay, results in staleness

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[6] The father has since died.

of the charge. *In Re Smith,* 73 Kan. 743, 85 P. 584, 586 (1906).

In the instant case, prejudice to the attorney was compounded by the accused being constrained by the attorney-client privilege and, hence, being unable to testify about any conversations or dealings with the clients (necessarily pointing all the more to the materiality of the clients' appearance).

Petitioner made numerous motions to dismiss on due process and fundamental fairness grounds. There is no indication that he slumbered on his rights. His only "delay" was an injury which prompted a brief continuance *sua sponte* by the court, over his own objections, incidentally.

The court, below, suggests that strict construction of statutory time limits is appropriate for charges against elected officials public officials and teachers, but not against attorneys, but without any reasons for the distinction. Indeed, there seems to be no compelling state interest in differentiating between teachers and lawyers, when it comes to protecting due process rights. See *e.g. Smith v. Goguen,* 415 U.S. 566 (1974) (the potential for abuse from a measure which may treat those similarly situated differently is unconstitutional).

CONCLUSION

There is no cogent reason why lawyers should be due process "step children" simply because they are lawyers. Recognition of due process rights of lawyers has largely taken place in the past decade, with this case presenting an opportunity to improve the administration of justice and heighten public confidence in the judicial system.

The case could turn on constitutional rights or upon rule-

making and inherent powers of the Court,[7] itself.

This Court has often spoken of the "chilling effect" a measure may have on constitutional rights, as grounds to invalidate the measure. The Court may, also, underscore the potential for abuse where officials are given too wide a latitude in interpreting or implementing a given measure.[8] Here, under the challenged rules, as the rules are written or as applied, a complainant may decide to "sit on" a complaint until the composition of a court changes (a particularly odious form of "forum shopping," so to speak), until an aged witness dies or until a renown defense lawyer retires. Such manifest arbitrariness,[9] or the potential for such a result, is unjust.

Whether prejudice in lengthy and unreasonable delays in attorney ethics' cases necessarily comes from such long delays, due to witnesses being unavailable and memories dimming, or whether an accused must show actual prejudice, such as a specific witness being absent or some evidence having been lost, still, considerations of due process and fundamental fairness call for imposition of some standard, some limitation, to a prosecution.

Whether a proceeding is styled civil, quasi-criminal or criminal, a wholesale disregarding of statutory time limits within which to bring a prosecution, with a caveat that the time-limits are "not jurisdictional", is, itself, egregiously arbitrary

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[7] See *Ex Parte Secomb,* 60 U.S. 9 (1856) for an analysis of bench and bar relations.

[8] See *e.g. Forsyth County, Georgia v. The Nationalist Movement,* ___ U.S. ___, 112 S.Ct. 2395 (1992).

[9] Justice McRae, dissenting, below, when asking: What rules govern disciplinary proceedings? finds considerable confusion as to whether criminal or civil rules apply or, even, if any rules at all apply [A. 32].

and subject to intolerable abuse. A procedure, as is provided for below, whereby a hearing and finding may be entered showing "good cause" for any delays may pass constitutional muster. It certainly would allow for appellate review of any abuse. Here, however, such a procedure was ignored and no hearing or finding of "good cause" for the interminable delays was ever held or entered upon the record.

A standard suggested in dissent, below, is that a cause must be tried within a "reasonable time." That test seems sufficient. On such basis, alone, it would seem that a delay of some nine years is a manifestly unreasonable time. Or, the Court may adopt the "balancing test" analogous to that of *Barker v. Wingo,* 407 U.S. 514 (1972), which provides that the court examine the length of any delay, the reason for the delay, the accused's diligence in calling for trial and the prejudice, if any, to the accused.

Petitioner would suggest that the first two tests are crucial. There should be consideration of the length of the delay coupled with the reason for the delay. The third test may not be needed, insofar as there is some authority that an accused does not need to "bring himself to trial," so to speak. However, if the accused has occasioned the delays himself, such misadventure might be ascribed against him. The final test of prejudice may not be needed as a factor, if the delay is considerably lengthy and prejudice would necessarily be implied. This case, for instance, represents one of the longest delays on record in a disciplinary proceeding in this country. If the delay is sufficiently short, however, then some actual prejudice might need to be shown. Or, resort might be, by analogy, to other statutes of limitations[10], under the notion that most civil and criminal

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[10] The federal limitation for a suit enforcing a civil fine or penalty is five years. 28 *USC* §2462. Civil claims against the United States are barred

statutes of limitations fall far short of the almost nine-year period presented in this case.

For these and for all the reasons heretofore set forth, it is requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, requisite, true copies of the foregoing Petition for Writ of Certiorari to Michael Martz, Attorney for Respondent, at PO Box 2168, Jackson MS 39225.

THIS the 13th Day of October, 1994.

Richard Barrett

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after six years, tort claims after two years. 28 *USC* §2401(a), (b) Libel and slander, assault and battery, is one year. §15-1-35 *Miss. Code Ann. (1972).* Actions on judgments must be brought within seven years. §15-1-43 *Miss. Code Ann. (1972).* Limitations on fraudulent concealment runs from when "fraud shall be, or with reasonable diligence might have been, first known or discovered." §15-1-67 *Miss. Code Ann.. (1972).*

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

No. 92-BA-00336

RICHARD BARRETT

v.

THE MISSISSIPPI BAR

EN BANC.

BANKS, JUSTICE, FOR THE COURT:

Today the issues we resolve center around an attorney's handling of a petition for the removal of disabilities pursuant to Miss. Code. Ann. §93-1919 (1972). We conclude that attorney Richard Barrett did not err in filing the petition for the removal of disabilities in Scott County. Despite that, we find that Barrett violated his oath of office, as well as Mississippi Code o Professional Responsibility, Disciplinary Rules 102(A)(4,5, ad 6) by failing to inform the court that a guardianship existed in Rankin County. Consequently, we affirm the public reprimand ordered by the tribunal.

Conversely, even though we conclude that while Barrett engaged in unnecessary gamesmanship when he refused to move for a continuance, he should not incur a fine where the tribunal continued the manner [sic], *sua sponte*, based on its assessment that Barrett was present and continuing to refuse to request a continuance, for the stated reason of preserving his "speedy trial"argument. We vacate the order assessing the fine.

I.

This appeal arises out of a disciplinary hearing in which the Complaint Tribunal of the Southern District of the Mississippi State Bar found that Richard Barrett violated DR's 1-102(A)(3, 4, 5 and 6) of the Mississippi Code of Professional Responsibility and the Attorney's Oath of Office. The complaint was filed in 1982. The merits of the case were not heard until 1991 due to delays caused by the Bar and Barrett. After a full hearing in May of 1991, The Tribunal imposed a public reprimand as the appropriate sanction. Barrett filed a motion for reconsideration. The motion was denied. Barrett appealed. The Bar cross appealed.

The basis of the Bar's action against Barrett resolves around Barrett's representation of the McPherson family (Charles, the father, and Brenda, the daughter) in a removal of disabilities proceeding in the Chancery Court of Scott County. Shirley MacPherson [sic], Charles' former wife and Brenda's mother, was killed in an automobile accident on January 18, 1978. Brenda, who was then fourteen-years old, was Shirley's only surviving heir.

On July 17, 1978, Charles, represented by Barrett, filed a petition for general guardianship of the person and estate of Brenda wherein he asked to be appointed general guardian of said minor and to be authorized to pursue whatever actions at law or equity against various individuals or entitles, who may be liable to Brenda. On the same day a decree appointing Charles as the guardian over his daughter's person was entered. Charles also filed on that day a petition to sell Shirley's residence for $15,000. The chancellor disapproved the sale because he was personally familiar with the value of the property involved. The chancellor ordered an appraiser's opinion concerning the fair market value of the house. On July 21, 1978, an amendment to petition for sale of real property was

filed by Charles to sell Shirley's property for $23,000. The appraisal placed the value of the house at $22,000. The petition was granted.

On August 17, 1978, Charles filed a petition to substitute guardian as plaintiff in an action pending, for authority to settle an insurance suit for $10,000, to approve an attorney contract and fee of $5,000, to pay funds and to provide allowance to guardian for ward. The court granted the relief sought by Charles with the exception that only $500 was approved for Barrett's attorney fees because he did not support his request with the production of sufficient documentation justifying a larger fee.

Charles' father Bill was appointed guardian ad litem in March of 1978. The Court found of its own motion and for good cause shown, that Charles has absented himself from the jurisdiction of the court, had neglected and failed to perform his duties and responsibilities as guardian and it was reasonable and proper for Charles to be removed as guardian.

Barrett later filed a petition for permission to withdraw as counsel for the minor and for payment of attorney fees. In his petition, Barrett alleged that despite diligent effort, he had not been able to locate his client. An ex parte hearing was held before the Chancery Court of Rankin County, Mississippi, resulting in the entry of a decree approving final accounting, removing Charles as guardian, removing Bill McPherson, Brenda's grandfather, as guardian ad litem, appointing the chancery clerk as guardian, and approving withdrawal of counsel and granting leave to Barrett to become a party in the guardianship case for the purpose of protecting any attorney fees awarded to him for service he had provided the guardianship.

From August of 1979 until February 1982, the guardianship and estate remained dormant. In February 1982, Barrett asked

Hinds County Chancellor Paul Alexander what the usual procedure would be with regard to the removal of disability of minority for a minor. Barrett made the same inquiry with the Rankin County Chancellor, who wanted to know to which case he was making reference. Barrett informed the chancellor that the reference involved the case of Brenda Carol McPherson. The chancellor looked through Brenda's file and found a draft of the petition to remove the disability of minority. The chancellor informed Barrett that he would require extensive proof of the minor's ability to manage her own estate before he would consider removing her disability of minority.

Subsequently, it is alleged, the McPhersons moved to Scott County. On March 3, 1982, Barrett filed a petition for general removal of disability of minority on behalf of Brenda in the Chancery Court of Scott County, Mississippi. Charles and Bill, Brenda's father and grandfather, joined in the petition. The petition was heard on an ex parte basis before the special chancellor. According to the chancellor, the reason given for the removal of disabilities was Brenda wanted to enter the restaurant business with Charles and Bill and needed to be able to sign contracts and enter into various business relationships on behalf of the restaurant enterprise. Although the question of financing the restaurant arose, neither Barrett nor his clients informed the chancellor that Brenda wanted to enter a business venture and stood to gain access to approximately $20,000 in her guardianship estate.

The special chancellor granted the petition on March 3, 1982. Six days later Barrett filed a petition for closing estate, for dissolution of guardianship, for accounting and disbursal of funds to be filed by Brenda in the Chancery Court of Rankin County, Mississippi. The Rankin County chancellor then contacted the special chancellor and informed him of the possibility of fraudulent procurement of a decree in Scott County Chancery Court removing the disability of the minor.

Prior to that occasion, the Rankin County Chancellor wrote that special chancellor a letter informing him that he expected Barrett to file a petition to close the guardianship and that such petition had now been filed. The special chancellor informed the Rankin County court that no mention was made of any pending guardianship matter when the petition came before him, and he noted that he felt he "was misled by the witnesses who testified."

On April 21, 1982, a hearing was held in Rankin County Chancery Court before Judge Bridges concerning what evidence, if any, was presented to the Chancellor of the Second Chancery Court District involving the existence of the guardianship. No evidence was adduced indicating that there was any mention of an ongoing active guardianship for Brenda's benefit. On April 22, 1982, Barrett filed a Motion for Recusal of the Chancellor of Rankin County pursuant to §165 of the Constitution of the State of Mississippi. The chancellor entered an order on February 24, 1983, recusing himself as chancellor in the guardianship of Brenda Carol McPherson and estate of Shirley McPherson. The chancellor appointed Chancellor Paul Alexander upon agreement of all parties. The guardianship and estate cases were transferred on August 31, 1983, to the Scott County Chancery Court at the request of Brenda. The removal of disability petition was affirmed.

More than five years later, the Bar filed a formal complaint against Barrett charging him with violating the Mississippi Code of Professional Responsibility. The Tribunal set the trial date for August 30, 1989. The Bar in its Motion to set a trial date noted that the 180-day rule, governing tribunal adjudications, would run on June 5, 1989. The Tribunal continued this case four times before reaching the merits. Trial dates were set for August 30, 1989, September 5, 1989, December 8, 1989, March 14, 1990, and May 23, 1990. There was no objection to the August trial date, even though it came

after the 180-day rule had expired. The September 5 trial date was rescheduled because the assistant general counsel assigned to prosecute this case was pregnant. Chancellor Billy Bridges, a material witness, was not available on December 8, and the trial was continued. On its own motion on March 14, 1990, the Tribunal set the trial date for May 23. On April 10, 1990, Barrett filed a motion to dismiss. IT was denied. On May 23, Barrett appeared in court in a half-body case and under the influence of prescription drugs. Barrett refused to move for a continuance. The presiding judge granted a continuance. A trial on the merits commenced on May 3, 1991.

II.

Barrett contends that the trial court erred in disciplining him because his position in representing his client was supported by the law or by a good faith argument. That is, under the law of this state, Barrett could lawfully file a petition for the removal of disabilities in the county where the minor resided. In addition, Barrett argues he acted in good faith when he filed the petition in Scott County.

Conversely, the Bar contends that Barrett did not act in good faith. Since Charles had been removed as Brenda's guardian, the Bar argues, Barrett should have filed the petition for the removal of disabilities in Rankin County, where the chancellor had been appointed as Brenda's guardian. We disagree.

Miss. Code Ann. section 93-19-1 provides:

> The chancery court of the county in which a minor resides, or the chancery court of a county in which a resident minor owns real estate in matters pertaining to such real estate, may remove the disability of minority of such minor.

The language in section 93-19-1 is quite clear. It explicitly

permits the removal of disability in the county where the minor resides or owns real property. Although Barrett had two options as to where he could file the petition for the removal of disability, he opted to file the petition in the county in which Brenda resided. Thus, Barrett's conduct fell within the purview of section 93-19-1.

We reject the Bar's contention that Barrett should have filed the petition in the Chancery Court of Rankin County. There is no basis to support such a contention. The statute does not require that a petition for the removal of disabilities be brought in [the] same court where the guardianship has been established. Rankin County was not the proper place to file a removal petition because Brenda's residence was not there and she did not own any real property in that county. Additionally, there was no evidence that Brenda owned real property anywhere in Mississippi. Scott County was the only proper place to file the petition because Brenda resided there. Barrett did not act contrary to law when he filed there.

III.

Having resolved the issue where Barrett could have filed the petition for the removal of disabilities, we turn to Barrett's duty to the court upon filing the petition. Here, we focus on what Barrett should have done once he filed the petition in Scott County.

Barrett contends that the tribunal erred in finding that he violated DR 1-102(A)(3, 4, 5, and 6) of the Code of Professional Responsibility and section 73-3-35 of the Mississippi Code Annotated (1972).

This Court is charged by law to inquire whether the evidence before a Complaint Tribunal is clear and convincing. "In an attorney disciplinary proceeding, the Supreme Court is the supreme trier of fact, and as a matter of law, is not bound by

any findings of fact made by the Complaint Tribunal." *Goeldner v. Mississippi State Bar Ass'n*, 525 So.2d 403, 406 (Miss.1988).

The attorney's oath is found in Miss. Code Ann. §73-3-35 (Supp.1988). It provides that:

> Every attorney and counselor at law, before he shall be permitted to practice, shall produce his license in each court where he intends to practice, and in the presence of such court, shall take the following oath or affirmation to wit: "I do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, according to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the constitution of the State of Mississippi so long as I continue a citizen thereof. So help me God."

DR 1-102(A)(4), (5), and (6) of the Code of Professional Responsibility[1] provides: "a lawyer shall not engage in illegal conduct involving moral turpitude, engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, engage in conduct that is prejudicial to the administration of justice, or engage in any other conduct that adversely reflects on his fitness to practice law."

The question before this Court is whether our law required Barrett to disclose the existence of a guardianship in Rankin

---

[1] This provision was applicable at the time of occurrence of the offense here charged.

County to the chancellor in Scott County. We answer in the affirmative.

"An attorney in his dealings with the court should always make full disclosure to the court and should never seek to mislead the court into unnecessary or unwarranted action by any artifice or concealment." *State v. Weinstein*, 411 S.W.2d 267 (1967). In *Weinstein,* the relators' attorney failed to disclose the existence of the entry of appearance and request make of the state when he filed the relators' Petition for Write of Prohibition. The *Weinstein* Court stated that "it was the responsibility and duty or [sic] relators' attorney to give us a frank and complete resume of all the actions he had taken in the Juvenile Court proceeding that was pending before respondent at the time said attorney filed relators' Petition for Writ of Prohibition."

We conclude that Barrett had a duty to make full disclosure to the chancellor of Scott County regarding the existence of a guardianship in Rankin County. While not explicitly stated in our rules, the attorney's oath of office required Barrett to deal honestly with the court. The duty to deal honestly with the court requires the disclosure of all material facts. Here, the court was only told that Brenda was 19 years old and that she needed her disability removed so she could enter into a restaurant business with her father and grandfather. When asked how the venture was to be financed, the parties spoke of a loan. This was only half of the story.

In the face of a keen interest by the court into the reason for removal of disability and the financial resources for the proposed restaurant venture, Barrett and his clients failed to disclose the separate estate of the minor child which was the subject of a guardianship in Rankin County. Certainly, it was relevant to the court that the minor had an estate in another county which she could not, in the absence of removal of the

disability of minority, dispose of summarily. Moreover, Chancellor Bridges had informed Barrett that if the petition came before him he would inquire extensively into Brenda's ability to manage her estate.

While the existence of a guardianship in another county may not have ultimately affected the chancellor's decision to grant the petition, it is necessary that a court removing disability have all pertinent information concerning the circumstances of a minor's life. Since the chancellor was not informed of the guardianship in Rankin County, the parties deprived him of an opportunity to consider relevant information regarding the removal of disability.

Barrett contends that his failure to disclose was the "honorable presentation of his client's cause." To support his contention, Barrett cites *McCartney v. United States,* 343 F.2d 471, 472 (9th Cir.1965), for the proposition that an attorney has the duty to honorably present his client's contentions in the light most favorable to his client.

While it is true that attorneys are charged with the duty of honorably representing their clients, that duty of honorable representation does not relieve an attorney of his duty to make full disclosure to the court. When representing a client before a court, an attorney has a duty to conduct himself "according to the best of my learning and ability, *and with all good fidelity as well to the court as to the client.*" See Miss. Code Ann. 73-3-35. (Emphasis supplied.)

In addition, Barrett violated DR 102(A)(4),(5), and (6). By failing to disclose all relevant information to the court, Barrett engaged in conduct involving dishonesty. Such conduct was prejudicial to the administration of justice and adversely reflects on Barrett's fitness to practice law.

IV.

Barrett contends that these proceedings should be dismissed for lack of a speedy trial. Barrett can not prevail on the deprivation of a speedy trial issue because there is no evidence that Barrett was prejudiced by the delay. *Myers v. Miss. State Bar,* 480 So.2d 1080 (Miss.1985).

Barrett contends that Mississippi recognizes the speedy trial rule of *Barker v. Wingo*, 407 U.S. 514 (1972). He is correct. *See, Perry v. State,* 419 So.2d 194 (Miss.1982). However, Barrett failed to cite any authority that stands for the proposition that Mississippi imposes the same speedy trial requirements in disciplinary actions that it imposes in criminal cases. The fact is, we have recently rejected just that contention. *The Mississippi Bar v. An Attorney*, No. 92-BA-00474, (Feb. 24, 1994).

Barrett's classification of disciplinary proceedings as quasi-criminal is correct. This Court on several occasions has recognized that bar disciplinary proceedings are inherently adversary proceedings of a quasi-criminal nature. *Attorney K v. Mississippi State Bar,* 491 So.2d 220 (Miss.1986), citing *Levi v. Mississippi State Bar,* 436 So.2d 781, 783 (Miss.1983). However, it does not follow that the same rules governing criminal cases govern quasi-criminal actions. *Barker* and *Perry* address the constitutional right to speedy trial applicable to criminal cases. A disciplinary action is not a criminal action and there is nothing in our case law that indicates that the same balancing test used in criminal proceedings must be utilized in disciplinary actions. This is accord with most states. Some states have held that the right to a speedy trial has no application whatever to a disciplinary proceeding against an attorney. *In the Matter of Williams,* 513 A.2d 793, 796 (D.C.1986); *In the Matter of O'Hara,* 408 N.Y.S.2d 70, 71 (N.Y.1978); *In the Matter of Posner,* 339 A.2d 657, 660

(Md.1975), *cert. den.* 425 U.S. 1016 (1975).

We recognize the need to dispose of disciplinary actions in a timely fashion. Rule 8.1 sets forth the time in which a disciplinary action should be adjudicated. It provides:

> Within ten (10) days following the designation of a complaint tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and ruling, trial and adjudication, all of which shall be completed within one hundred and eighty days from the date of the designation of the Tribunal, unless extended by the court on motion of either party for good cause shown.

Mississippi Code of Professional Responsibility DR 8.1 (1983).

In the instant case, the matter was not disposed of within the 180-day time frame. There were four delays before the merits of the case were heard. The question here is whether good cause was shown for extending the 180-day period. Barrett claims that the burden is on the bar to show that there was good cause for the delay. He cites *Nations v. State,* 481 So.2d 760, 761 (Miss.1985), to support his position.

Nations is distinguishable from this case, as it involved a criminally accused's right to a speedy trial pursuant to Miss. Code Ann. 97-17-1. This is a disciplinary proceeding, and although it is quasi-criminal in nature, it is not governed by the same rules that are utilized in criminal proceedings.

In *Myers* we held that the time limitations in §§73-3-319 and 325 are directory rather than jurisdictional. 480 So.2d at 1090. In dicta, we stated that "Strict construction of statutory time limits seems much more appropriate in election contests and non-tenured teacher dismissals than in the more cautious context of attorney disciplinary proceedings."

Barrett would have to demonstrate that he was substantially prejudiced by the delays before this court could determine that he was deprived of his right to a fair trial. *Id.; Mississippi Bar v. An Attorney,* Slip Opinion at p. 7. Barrett alleges that he was prejudiced "because material witnesses, the McPhersons present in the state during the initial phase when a speedy trial might have been had, were absent from the state and unavailable as witnesses, to the necessary and manifest prejudice of appellant."

Although Barrett contends that the McPhersons were materials witnesses, there is nothing in the record to support his allegation. Absent from the record is any indication that the McPhersons would be called as witnesses in the case or had anything of value to add. In fact, the McPhersons were never subpoenaed. Additionally, they never testified in any of the previous hearings. As such, Barrett has not demonstrated that he intended to call the McPhersons. Therefore, their absence cannot be used to support his claim of prejudice. It follows that Barrett's speedy trial claim must fail. *Id.*

V.

Barrett urges that it was error to assess expenses against him without substantial justification. In the instant case, the tribunal judge assessed additional costs against Barrett because Barrett refused to move for a continuance in a misguided effort to preserve his speedy trial argument.

Disciplinary Rule 27 of the Mississippi Rules of Professional Responsibility provides:

> A Tribunal or the Court may assess costs incurred in the investigation, prosecution and defense of any disciplinary matter as justice may require. Such costs and expenses shall include the actual and reasonably necessary expenses of the Bar, excluding Complaint Counsel's time.

We agree with Barrett to the extent that cost have been assessed to him as a sanction for his failure to request a continuance. While Barrett may have engaged in unnecessary gamesmanship, his failure to request a continuance was his right and he should not incur additional costs where the tribunal continued the manner [sic] *sua sponte* based on its assessment that Barrett was not physically able to proceed despite the fact that Barrett was present and continuing to refuse to request a continuance in order to preserve his speedy trial argument. That is not to say that the tribunal erred in continuing the matter. We only say that Barrett's refusal to request a continuance should not incur a sanction. To the extend that the continuance increased the "actual and reasonably necessary expenses of the Bar," Barrett is liable only because misconduct was ultimately found. Rule 27(a) and (b), Rules of Discipline.

It is not clear to this court whether Barrett has been assessed any costs that he would not ordinarily have been assessed as lawyer against whom discipline is imposed. To the extend that cost [sic] has been assessed which would not have been assessed to Barrett as a losing party, the order of the tribunal assessing costs is vacated.

VI.

On cross appeal, the Bar argues that Barrett should be sanctioned more severely that a public reprimand because of his willful and intentional misconduct as well as prior discipline that has been imposed upon him. The Bar cites a litany of cases in support of its contention. We reject the Bar's assertion.

In disciplinary matters, this Court by law is the finder of fact. or great respect and appreciation for the work of those who serve on the complaint tribunals may not, as a matter of law, translate into any duty of deference to findings or decision their [sic] made. In practical effect, we proceed *ab initio. Attorney Q v. Mississippi State Bar,* 587 So.2d 228, 231, citing

Mississippi State Bar v. Odom, 566 So.2d 712, 714 (Miss.1990); *Mississippi State Bar v. Nichols,* 562 So.2d 1285, 1287 (Miss.1990); *Mississippi State Bar v. Varnado*, 557 So.2d 558, 559; *Levi v. Mississippi State Bar,* 436 So.2d 781, 783 (Miss.1983).

Nevertheless, we reluctantly ratify the sanction recommended by the tribunal. While Barrett's conduct violated a reasonable interpretation of his oath and our rules, it transgressed no explicit provision or prohibition. The Bar's protracted delay in institution these proceedings may also have been considered by the tribunal.

CONCLUSION

For the foregoing reasons the order of the tribunal imposing a public reprimand is affirmed and the order taxing costs is vacated with costs for these proceedings to be taxes in a subsequent order of this court.

ORDER OF COMPLAINT TRIBUNAL AFFIRMED IN PART AND REVERSED IN PART.

HAWKINS, C.J., PRATHER, P.J., SULLIVAN, AND PITTMAN, JJ., CONCUR. ROBERTS, J., CONCURS IN RESULT ONLY. LEE, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION. McRAE, J., DISSENTS WITH SEPARATE WRITTEN OPINION. SMITH, J., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI

No. 92-BA-00336

RICHARD BARRETT

v.

THE MISSISSIPPI BAR

LEE, PRESIDING JUSTICE, DISSENTING:

I agree with the majority opinion except for those portions that effectively deny attorneys in this State any right to a speedy resolution of disciplinary proceedings.

As I stated in my earlier dissent in *The Mississippi Bar v. An Attorney,* 92-BA-00474 (Feb. 24, 1994), I do not believe that a criminally accused's right to a speedy trial as announced in *Barker v. Wingo,* 407 U.S. 514 (1972), extends to bar disciplinary proceedings. But I cannot agree that attorneys facing serious penalties have no constitutionally protected interest in an expeditious resolution. Due process and fundamental fairness require that an attorney not be called upon in 1991 to defend against a complaint filed in 1982, where no good reason is shown for the Bar's delay. To quote from my earlier dissent on the subject of speedy resolution of disciplinary proceedings:

> That due process must be afforded to attorneys in disciplinary proceedings is beyond peradventure. See *Netterville v. Mississippi State Bar,* 397 So.2d 878 (Miss.1981). As this Court has recently stated:
>
> We have repeatedly held that attorneys who are accused in bar disciplinary proceedings have the right to due process of law, *Attorney K. v.*

Mississippi State Bar Association, 491 So.2d 220, 222 (Miss.1986); *Myers v. Mississippi State Bar,* 480 So.2d 1080, 1087 (Miss.1985)[;] *Netterville v. Mississippi State Bar,* 397 So.2d 878, 883-84 (Miss.1981), although it is not at all clear that attorneys would be without this right if disciplinary proceedings were regarded as wholly civil in nature.

Mississippi State Bar v. Young, 509 So.2d 210, 212 (Miss.1987).

...

Rule 8.1 of the Mississippi Rules of Discipline clearly provides that proceedings "shall be completed within 180 days from the date of the designation of the tribunal, unless extended by the court on motion of either party for good cause shown."

Rule 26 provides, in pertinent part:

References to time within these rules and procedural sections are directory and not jurisdictional. Time limitations are administrative, not jurisdictional; however, the time for filing appeals or seeking reinstatement shall be jurisdictional. Failure to observe directory time interval may result in contempt of the agency having jurisdiction but will not justify abatement of any disciplinary investigation or proceeding.

In my estimation, the remedy provided by Rule 26 is woefully insufficient as a safeguard for the due process right to a speedy resolution of disciplinary proceedings.

> I would interpret Rule 8.1 as a[n absolute] requirement and hold that violations without a finding of good cause require dismissal of the complaint.

The Mississippi Bar v. An Attorney, 92-BA-00474 (Feb. 24, 1994) (Lee, P.J. dissenting).

No good can come from this Court allowing the State Bar to sit on a complaint against an attorney for almost nine years. Accused attorneys are entitled to faster resolution and members of the public deserve more timely protection. Regrettably, the only way to create an effective incentive for the Bar to act seasonably is to reverse sanctions imposed after an unreasonable delay. Furthermore, Rule 8.1 establishes a generous time frame for handling bar matters (which was also exceeded in this case), and I think this Court should enforce it. Accordingly, I would also reverse the public reprimand and dismiss the Bar's complaint with prejudice.

IN THE SUPREME COURT OF MISSISSIPPI

No. 92-BA-00336

RICHARD BARRETT

v.

THE MISSISSIPPI BAR

McRAE, JUSTICE, DISSENTING:

I concur with Presiding Justice Lee's dissent that the basic tenets of due process and fundamental fairness command that a lawyer should not be required to defend himself in 1991 against a complaint filed against him in 1982 where no good cause has been shown for the Mississippi Bar's delay. However, I disagree with the majority's opinion for the same reasons I dissented in *The Mississippi Bar v. An Attorney,* 636 So.2d 371 (Miss.1994).

The majority concedes that disciplinary proceedings are quasi-criminal in nature but holds that Mississippi's case law does not require that the same balancing test used in criminal proceedings be employed in disciplinary proceedings. Specifically, the majority states, "[I]t does not follow that the same rules governing criminal cases govern quasi-criminal actions." The majority does not recognize Rule 8.1 of the Rules of Discipline for the Mississippi Bar, which provides:

Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, *unless extended by the Court on*

motion of either party for good cause shown. (emphasis added).

Specifically quoting from my earlier dissent concerning Rule 8.1:

> The word "shall" obviously has no further meaning than "will" or "may." ...The majority denies an attorney the right to argue a technical defense, i.e. the rules regarding a speedy disposition of a matter before the Complaint Tribunal, but the Bar, however, is permitted to use technical devices such as default judgments when an attorney fails to timely file a response.

636 So.2d 376.

The majority states that the question that must be answered is "whether good cause was shown for extending the 180-delay period." Barrett argues that the burden of proof rests with the Mississippi Bar in showing that there was good cause for the close to nine year delay. The majority skirts around this real issue as it never addresses the question of which party has the burden of proof in such a case. The majority argues that Barrett's authority, *Nations v. State,* 481 So.2d 760, 761 (Miss.1985), which holds that the prosecution bears the burden of proving a good cause when the record is silent, is distinguishable from the case at hand because it involved a criminal charge. In very general terms and without holding who has the burden of proof, the majority distinguished, "This is a disciplinary proceeding, and although it is quasi-criminal, it is not governed by [the] same rules that are utilized in criminal proceedings." Query: What rules govern disciplinary proceedings? Why employ rules from civil proceedings rather than criminal proceedings when it is our law that disciplinary proceedings are more closely related to criminal charges and defined as quasi-criminal?

It is irrational to hold that Barrett himself must show that the Mississippi Bar did not have a good reason to request a delay. Who else is in a better position to show good cause by the Bar itself? There is no dispute that in a disciplinary proceeding, the Bar is the moving party and Barrett is the responding party. When an attorney brings any type of motion before either chancery or circuit court, that attorney has the burden of proving his motions. There simply can be no distinction between the two scenarios. Because the Bar did not show any good cause for the extended period of time, Barrett should not have to defend himself in an action that is nearly nine years old.

In any event, a statute of limitations should apply at some point regardless of whether this Court holds that a disciplinary proceeding is governed by criminal rules or civil rules. As I articulated in my dissent in *The Mississippi Bar v. An Attorney:*

> I can find nothing in the state and federal constitutions, Mississippi case law, Rules of Professional Conduct or Rules of Discipline stating an attorney loses the rights afforded to all when he or she takes the oath to practice law.

636 So.2d 377.

With the majority's holding, an attorney, when faced with a disciplinary action, does not have the rights that are granted to all other citizens of this great nation. The majority holds that no prejudice existed due to the long period of time. To the contrary, the fact alone that a Bar complaint has been filed torments a lawyer until the matter is resolved. A Bar complaint is indeed prejudicial to an attorney as he remains in purgatory until the resolution of the matter. Because lawyers should not have to give up any rights to become a lawyer, particularly statute of limitations, I respectfully dissent.

Supreme Court, U.S.
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No. 94-697

In The

Supreme Court of the United States

October Term, 1994

RICHARD BARRETT

Petitioner,

v.

THE MISSISSIPPI BAR

Respondent.

On Petition For Writ Of Certiorari To The Mississippi Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court has the authority to review a decision of the Mississippi Supreme Court imposing discipline on a Mississippi attorney when a Petition for Rehearing/Motion for Clarification is currently pending before the Mississippi Supreme Court?

2. Does the United States Supreme Court have the authority to decide what statute of limitation Mississippi should adopt within which a disciplinary trial must be conducted?

3. Is Mississippi's requirement that disciplinary trials be conducted within 180 days from the date the hearing tribunal is appointed, unless extended by the Mississippi Supreme Court for good cause shown, unconstitutional?

4. Is Mississippi's rule that references to certain time limitations in its disciplinary process are administrative, not jurisdictional, violative of any constitutional right?

PARTIES BELOW

The Mississippi Bar

Richard Barrett

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Barrett, prayed that a Writ of Certiorari be issued to review the Judgment of the Supreme Court of Mississippi in this matter but has not presented persuasive reasons why certiorari should be granted.

OPINION BELOW

The ruling of the Mississippi Supreme Court from which the Petitioner seeks certiorari is included in the case styled *Richard Barrett v. The Mississippi Bar,* at Appendix A of Petitioner's Petition, dated July 24, 1994, wherein a Public Reprimand was issued to him. At trial, the Complaint Tribunal imposed a Public Reprimand a decision affirmed by the Mississippi Supreme Court which heard the case *de novo* on the record made before the Complaint Tribunal. However, the July 24, 1994 Supreme Court decision was preceded by its decision in the case of *Attorney K v. Mississippi State Bar Association,* 491 So.2d 220 (Miss. 1986) (See Appendix "1" hereto), involving the same factual situation as the instant case but reversed by the Mississippi Supreme Court on procedural due process grounds.

SUMMARY OF THE ARGUMENT

The Petitioner herein submits that he has been denied due process of law and supports his position by stating that there has been a "delay of some nine years" in bringing him to the bar of justice. What Petitioner fails

to disclose to this Court is there has been no "delay of nine years" in the Mississippi Bar bringing charges against him since the facts upon which the instant proceeding is based occurred in March, 1982 and the initial informal complaint was filed in July, 1982. (A more complete summary of pertinent events is attached to Appendix "2" entitled "Chronology of Events").

The time from July, 1982 to May, 1991 was spent with investigating, prosecuting, appealing, re-investigating and re-prosecuting the 1982 factual situation.[1]

The mere fact that it took nine years to fully investigate and complete a trial before the Complaint Tribunal is not proof of delay.[2] Moreover, Petitioner submits that the Bar has violated its own rules.[3] In addition, Petitioner submits that the rules are patently arbitrary on their face or as applied by the Bar, further compounding the unconstitutionality of them but does not elaborate upon this position. In response, the Bar submits that Rule 8.1, Rules

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[1] At footnote 1 of Petitioner's Petition, he cites *Attorney K v. Mississippi State Bar*, 491 So.2d 220 (Miss. 1986) for support of his position that "Mississippi for instance, did not allow a lawyer to confront witnesses against him in an ethics proceedings until 1986." In his footnote, Petitioner further notes that he was counsel in that case but does not disclose that *Attorney K* was the predecessor case to the instant case.

[2] The Bar has filed a Petition for Rehearing and/or Motion for Clarification of the Opinions with the Mississippi Supreme Court which is still pending before that Court that characterized the Bar's action or lack of action as constituting delay.

[3] The Mississippi Rules of Professional Conduct and the Rules of Discipline are rules adopted by the Mississippi Supreme Court, not the Bar.

of Discipline, is not arbitrary on its face or as applied since the purposes of the disciplinary process are met under Mississippi's disciplinary process.

United States Supreme Court Rule 10 clearly sets forth the grounds which must be established in order for a Petition for a Writ of Certiorari to be granted:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A Petition for Writ of Certiorari will be granted only when there are special and important reasons therefore."

In the case sub judice there simply does not exist any "special important reasons" to grant Petitioner's request for a writ. Instead, this action arises out of an ordinary, although lengthy, disciplinary case. As such, this case does not present any federal or state constitutional or statutory questions nor does it present any question upon which there is a conflict in the court of appeals or with the district courts. In addition, this case does not present an important issue of federal law nor does it present a conflict between a decision of a court of appeals and the Mississippi Supreme Court regarding a general, non-federal matter.

Moreover, as evidenced by the Mississippi Supreme Court's decision in the predecessor proceeding to the instant case, an adequate remedy exists with the Mississippi Supreme Court and within the Mississippi disciplinary process. Likewise, this proceeding is premature at best, since a Petition for Rehearing and/or Motion for Clarification of the Opinions has been filed in the instant

case which is currently pending before the Mississippi Supreme Court. (See Appendix "2" attached hereto.)

To justify a grant of certiorari the "special important" reasons must be more than "academic or episodic", the issues must "reach constitutional dimensions". *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). "This Court does not sit to satisfy a scholarly interest . . . nor does it sit for the benefit of the particular litigant." *Rice,* 39 U.S. at 4 (citing *Magnum Import v. Cody,* 262 U.S. 159, 163 (1923). As the Court in *Layne and Bowler Corporation v. Western Well Works, Inc.,* 261 U.S. 387 (1923) stated:

> "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embracing conflict of opinion and authority between the circuit courts of appeal." *Layne and Bowler Corporation,* 261 at 393.

Therefore, the instant Petition does not deserve to be sustained.

STATEMENT OF THE CASE

The Bar's Appendix "2" describes the pertinent events involved with the investigating and prosecuting of a disciplinary complaint, after remand of the initial disciplinary complaint from the Mississippi Supreme Court,

filed against Mr. Barrett involving the instant factual situation.[4]

As Petitioner has indicated, the Bar filed a Complaint against him on July 29, 1982 alleging that he had misled the court, by failing to disclose to the Chancery Court of Scott County, Mississippi, sitting in a special session at Bay Springs, Mississippi in Jasper County an emancipation proceeding brought on behalf of a minor by her father in Scott County to remove the disability of "minority" while a guardianship for the benefit of the minor was active in Rankin County. Based upon these facts, the Mississippi Supreme Court found that Barrett violated his oath of office as an attorney and DR's 1-102(A)(4[5], 5[6] & 6)[7] of the Code of Professional Responsibility by failing to inform the Court that a guardianship existed in Rankin County, Mississippi when he presented the Petition for Removal of Disability of Minority in Scott County on behalf of the same minor.

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[4] The Chronology of Events attached to Appendix "2" only lists the pertinent events after the Mississippi Supreme Court reversed the imposition of a Public Reprimand on procedural grounds. See *Attorney K v. Mississippi State Bar Association*, supra.

[5] DR1-102(A)(4) provides "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[6] DR1-102(A)(5) provides "a lawyer shall not engage in conduct that is prejudicial to the administration of justice."

[7] DR1-102(A)(6) provides "a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law."

REASONS FOR NOT GRANTING THE PETITION FOR WRIT OF CERTIORARI RESPONSE TO PROPOSITION

AN ATTORNEY IS ENTITLED TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OR UNDER TRADITIONAL NOTIONS OF FAIR PLAY BUT IT IS LEFT UP TO THE STATES TO DECIDE IF ANY TIME LIMITATIONS SHOULD BE ESTABLISHED FOR THE FILING OF A DISCIPLINARY COMPLAINT AND WHEN TRIAL MUST BE HELD.

Notwithstanding Petitioner's comments, this case is simply one involving a disciplined attorney, understandingly disappointed over the Mississippi Supreme Court's affirmation of discipline imposed on him by a Complaint Tribunal, who seeks review and redress from this Court by raising an alleged lack of due process. This is not a proper case for an issuance of a Writ of Certiorari. Petitioner is simply mounting a last ditch effort, after years of litigation in the Mississippi disciplinary system, to convince this Court to provide him with further delay from facing the discipline which is now inevitable.

As Petitioner correctly points out: "Disciplinary proceedings have been left largely to the states". Therefore, in order for this Court to invade the province of each state to exercise its "inherent and exclusive jurisdiction"[8] over attorney discipline, a fundamental freedom must exist[9], otherwise each state is free to develop its own system of attorney regulation. In fact, some states utilize

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[8] Rule 1, Mississippi Rules of Discipline.

[9] For example, freedom of speech. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

a process whereby the prosecuting attorney is an agency or master of the State's highest Court. Other states, like Mississippi, enlist the assistance of the State Bar to assist the legal profession by investigating and, where warranted, prosecuting allegations of attorney misconduct. Regardless of what process is utilized, the various states set their own standards and enforce them.[10]

In support of his argument that he has been denied due process, the Petitioner partially relies upon incomplete reasoning from a dissent in the Mississippi Supreme Court's decision. For example, he cites a Justice's dissent where the Justice stated "there is nothing in the Federal Constitution by which an attorney loses the right afforded to all when he takes the oath to practice law" but does not identify the right to which he is referring except to say "the rights that are granted to all other citizens of this great nation" (A 33). This incomplete statement lends itself to the asking of many questions including: Which "rights" and under what circumstances?

Moreover, Petitioner submits to this Court that it is presented with a delay of some nine years from the date the charge was made and trial had. However, as Appendixes "1" and "2" demonstrate the "delay" from 1982

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[10] It is submitted that the United States Supreme Court has no authority to order the Mississippi Supreme Court to adopt a rule that a disciplinary complaint be tried within a specific period of time. However, Mississippi has adopted a 180 day rule but that 180 day rule can be extended when good cause is shown and the United States Supreme Court has no authority to decide if that rule is unconstitutional.

through 1986 was brought about to protect Petitioner's right of confrontation. In addition, a substantial portion of the "delay" from 1986 to 1991 was to allow the Petitioner to fully cross-examine his accusers in deposition type proceedings and to recover from his "illness". Obviously, the "rights" to be protected are notice of charges and an opportunity to defend against those charges. The Petitioner was afforded these rights and the Mississippi Supreme Court so found.[11]

Petitioner lists six rationales in support for his position. Among these rationales are (1) laches, (2) staleness, (3) prejudice, (4) "actual" prejudice, (5) fault, and (6) "no speedy trial at all." Interestingly, all of the cases cited by Petitioner in support of his rationales are decisions from the various states' highest courts. Petitioner cites no Federal Court or U.S. Supreme Court decisions to support his various theories. This demonstrates that disciplinary proceedings are usually left to the jurisdiction and discretion of the various states. Moreover, Petitioner raised these issues in his appeal to the Mississippi Supreme Court, all of which were rejected.

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[11] Effective January 1, 1984, the Mississippi Supreme Court exercised its "exclusive and inherent" jurisdiction over bar disciplinary proceedings to transfer these duties from the Mississippi Legislature to itself. Prior to January 1, 1984, Mississippi's disciplinary process was governed by statute. Effective January 1, 1984, the disciplinary process was governed by Rules adopted by the Mississippi Supreme Court. One of the Court's amendments was to clarify the accused attorney's right to confront and examine his accusers and their witnesses.

Notwithstanding these basic arguments, taking Petitioner's rationales one by one they can easily and summarily be addressed.

First, "laches" has no merit since the Bar did not delay in bringing the charges against Mr. Barrett. What took so long was adjudication of the charges, not the bringing of the charges. Adjudication is within the province of the judiciary or its appointees.

In addition, laches is an equitable concept. Therefore, there is no quantifiable time period by which laches can be measured. Laches has been defined as:

> An equitable doctrine which bars a claim for relief if an unreasonable delay prejudices the defendant. *Landis v. Hudgson*, 109 Idaho 252, 706 P.2d 1363 (Idaho 1985).

Moreover, many jurisdictions have ruled that laches is not applicable in bar disciplinary cases because the purpose of those proceedings is protection of the public. *Attorney Grievance Commission v. Kahn*, 431 A.2d 1336 (1981); *Attorney Grievance Committee of Maryland v. Engerman*, 424 A.2d 362 (Md. 1981); *Anne Arundel County Bar Ass'n. v. Collins*, 325 A.2d 724 (1974); *In Re Weinstein*, 459 P.2d 549 (1969).

Even in those jurisdictions that have ruled laches is applicable have required a showing of prejudice[12] or only

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[12] *Osterloh v. State of Idaho*, 100 Idaho 702, 604 P.2d 716 (Idaho 1979); *State ex rel. Oklahoma Bar Ass'n v. Lowe*, 640 P.2d 1361 (Okla. 1982).

used as a factor to be considered in mitigation of the sanction to be imposed.[13]

For the foregoing reasons, the Bar submits this argument should be rejected.

Second, "staleness" must be rejected for the reasons listed immediately above.

Third, "prejudice" must be rejected because there has been no presentation of credible evidence to support an allegation of prejudice. If there was, the Mississippi Supreme Court may have dismissed the charges since it said Barrett would have to demonstrate that he was substantially prejudiced by the delays before the Court could determine that he was deprived of his right to a fair trial (App. 25).

Fourth, "actual" prejudice should be rejected for the same reason that prejudice should be rejected.

Fifth, the "fault" was not entirely the Bar's. The Petitioner carries a responsibility for a portion of the "delay".

Sixth, Petitioner admits that Mississippi is a "no speedy trial right state". The Bar tends to agree but since we have no case law directly on point where real and actual prejudice existed, we do not know for sure what the Mississippi Supreme Court's decision would be when that issue is properly raised. Nevertheless, Mississippi

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[13] *Louisiana State Bar Association v. Edwards*, 387 So.2d 1137 (La. 1980); *Matter of McNerthney*, 610 P.2d 731 (1980); *Matter of Ressa*, 621 P.2d 153 (1980); *Application of Phillips*, 510 F.2d 127 (1975).

can be considered a "no speedy trial right" state at the present time except for the existence of actual prejudice.

Petitioner advances the argument that the minor and her father would have been material witnesses in his defense. He further submits that they were present, willing and able to testify for many years but by trial had left the jurisdiction and could not be subpoenaed. Throughout the nine (9) year history of this case, Mr. Barrett did not voluntarily produce the father and daughter as witnesses. Moreover, the record will reflect that the Petitioner did not request subpoenas be issued for them to testify during the nine (9) year period it took to get the complaint investigated and tried.[14]

Moreover, any inference that the father and daughter could have rebutted the two prosecution witnesses' testimony, who were Judges or former Judges, is speculation. The Petitioner had access to and knowledge of the whereabouts of these witnesses not the Bar. For him to now come before this Court and complain about not having them available to testify either voluntarily or through judicial compulsion is an attempt to lay blame on someone else for his apparent lack of ability to preserve testimony he felt would be favorable to him.

The record reviewed by the Mississippi Supreme Court does not include any evidence that Barrett ever intended to call the father and daughter as potential witnesses, either in the investigatory stage or at trial

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[14] The Petitioner was obviously aware of the availability of having subpoenas issued for their attendance since that issue was litigated in the *Attorney K* decision previously cited herein.

before the Complaint Tribunal. He made no specific proffer of what their testimony would be. In fact, the Mississippi Supreme Court held that "Barrett (did) not demonstrate that he intended to call" (the father and daughter as witnesses) (App. 25). Therefore, the absence of these witnesses cannot be used to support his claim of prejudice.

Petitioner further argues that he was constrained by the attorney/client privilege and, therefore, was unable to testify about his conversations or dealings with his clients. This argument fails for several reasons. First, this issue has already been rejected by the Mississippi Supreme Court. Second, Petitioner does not and did not disclose the nature of these conversations or dealings or how they confined or constrained him in his defense. Third, the Petitioner was tried for his conduct, not his clients'. Fourth, Rule 1.6(b)(2), Mississippi Rules of Professional Conduct, allows an attorney to disclose confidential information to the extent the lawyer reasonably believes necessary to establish a defense to a criminal or civil charge against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Finally, Petitioner argues that teachers[15], elected public officials and lawyers should all be treated equally but gives no explanation why public employees and servants

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[15] Petitioner's comparison and equating of teachers to lawyers was specifically rejected by the Mississippi Supreme Court in the decision rendered in this case, at least to "non-tenured" teachers (App. 24).

should be elevated to the status of "officers of the court" as lawyers are considered. Indeed, such promotion is interesting but not explained.

CONCLUSION

The purposes of the Mississippi disciplinary process are as follows:

First, to punish the wrongdoer. Second, to deter similar misconduct. Third, to preserve the dignity and reputation of the legal profession. Fourth, to protect the public. *Mathes v. Mississippi Bar*, 620 So.2d 1213, 1222 (Miss. 1993).

In *Mathes*, the Mississippi Supreme Court said that the imposition of sanctions has a definite role in reinforcing the confidence of the general public in the legal profession's ability to govern itself. This role is very important regarding Bar disciplinary proceedings because the legal profession assumes the responsibility of governing its members. Therefore, public confidence, faith and integrity in the Bar is dependent upon a willingness to impose appropriate sanctions on its members who have violated the various Codes of Professional Responsibility. 620 So.2d at 1222.

Dismissal of the charges lodged against the Petitioner in the instant case would frustrate the purposes of the Mississippi disciplinary process especially when no unjustified or prejudicial delay is present. Moreover, Petitioner failed to mention that in the Mississippi Supreme Court decision it noted that the delay in bringing the case

to trial was the fault of both the Bar and Mr. Barrett (App. 14).

The issues included in the present Petition for Writ of Certiorari have previously been presented to the Mississippi Supreme Court by this Petitioner and rejected. Furthermore, there is no special and important reason to grant the instant writ.

The instant petition is "fact" specific. Accordingly, no undue or prejudicial delay existed in bringing the Petitioner to accountability. Ironically, what took so long to bring this case to a conclusion was a protracted attempt to give the Petitioner due process, not deprive him of it.

Respectfully submitted,

The Mississippi Bar

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APPENDIX "I"

ATTORNEY K,

v.

MISSISSIPPI STATE BAR ASSOCIATION.

Misc. No. 138.

Supreme Court of Mississippi.

July 16, 1986.

Disciplinary proceeding was brought. The Supreme Court, Robertson, J., held that failure to subpoena at investigatory hearing chancery judge, who was allegedly deceived by attorney during partition for removal of disabilities of minority of minor child, deprived attorney of his due process rights during Bar disciplinary proceeding, in that attorney, both verbally and in writing, requested issuance of subpoena, and chancery judge was a witness crucial to the case.

Remanded to Committee on Complaints without prejudice.

Richard Barrett, Jackson, for appellant.

Andrew J. Kilpatrick, Jackson, for appellee.

Before ROY NOBLE LEE, P.J., and PRATHER and ROBERTSON, JJ.

ROBERTSON, Justice, for the court:

This case comes before us on the complaint of the Mississippi State Bar that Attorney K[1] has been guilty of misconduct within the meaning and contemplation of certain Disciplinary Rules of the Code of Professional Responsibility of the Mississippi State Bar. More specifically the Bar charges that Attorney K presented to the Chancery Court of one county a partition for removal of disabilities of minority of a minor child without disclosing (a) that the same petition had been denied by another chancellor or (b) that the minor was the ward of a guardianship being administered under the jurisdiction of another chancery court. Proceedings before the Committee on Complaints resulted in a recommendation that the attorney be found guilty of unprofessional conduct and given a public reprimand. From that decision, Attorney K prosecutes this appeal.

The dispositive question appears one of procedure. It is nevertheless fundamental. At the investigatory hearing Attorney K sought to have subpoenaed the chancery judge who is said to have been defrauded and deceived. Our review of the record convinces us that this chancery judge was an important witness in the case, if not the most important witness, from whom the Committee on Complaints should have heard in any event. All of this takes on added dimension as the record reflects hearsay statements from various parties concerning the chancery

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[1] For reasons as obvious as they are statutory we employ the fictitious label "Attorney K" that public disclosure of the names of the attorney here charged might be avoided. Miss. Code Ann. § 73-3-343 (Supp.1985); Mississippi State Bar v. Attorney-Respondent, Etc., 367 So.2d 179 n. 1 (Miss.1979).

judge's view of the facts and, not surprisingly, those hearsay statements differ considerably. The record affirmatively reflects, however, that the entire Committee never heard from the horse himself.[2]

Attorney K's dispositive assignment of error is that he was denied the facility of the witness subpoena to compel the attendance of the trial judge. This we are told violated rights secured to Attorney K under the Constitution and laws of the State of Mississippi as well as the Constitution of the United States.

Bar disciplinary proceedings are inherently adversary proceedings of a quasi-criminal nature. *Levi v. Mississippi State Bar,* 436 So.2d 781, 783 (Miss.1983). In the course of such proceedings there is secured to the accused attorney the right to due process of law. U.S. Const. Amend. 14, § 1; Miss. Const. Art. 3, § 14 (1890); *Myers v. Mississippi State Bar,* 480 So.2d 1080, 1087 (Miss.1985); *A Mississippi Attorney v. Mississippi State Bar,* 471 So.2d 1230, 1233 (Miss.1985); *A Mississippi Attorney v. Mississippi State Bar,* 453 So.2d 1023, 1028 (Miss.1984); *Netterville v. Mississippi State Bar,* 397 So.2d 878, 883-84 (Miss.1981). Within the due process right so secured is the right of the accused attorney to have access to compulsory process for obtaining attendance of witness at critical stages of the disciplinary process. *Cf.* U.S. Const. Amend. VI; Miss. Const. Art. 3, § 26 (1890).

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[2] Apparently, the proceedings before the chancery judge where Attorney K presented the minority disabilities removal petition were ex parte and no transcript of same was made or has been preserved.

At the time in question our statute law provided that state bar disciplinary agencies had the "power to summons and examine witnesses under oath" and that all such "summons or subpoenas shall be issued by the clerk of the court". Miss.Code Ann. § 73-3-307 (Supp.1982); *see also Mississippi State Bar v. Attorney-Respondent, Etc.*, 367 So.2d 179, 182 (Miss.1979).

Though on its face the statute seems to implement the accused attorney's constitutional rights, two serious problems remain. First is the question of, who is the "clerk of the court"? The State Bar argues that the statutory language refers to the clerk of the Supreme Court, noting that inherent as well as statutory jurisdiction of all lawyer disciplinary proceedings are vested in this Court, *see An Attorney v. Mississippi State Bar Ass'n.*, 481 So.2d 297, 300-01 (Miss.1985); *Levi v. Mississippi State Bar*, 436 So.2d 781, 783 (Miss. 1983), and that the bar disciplinary agencies serve only as adjuncts to this Court. This view is correct and, as we understand it, the subpoena process in bar disciplinary proceedings is now administered by the clerk of this Court. This procedure was hardly clear four years ago which leads us to our more serious concern.

These proceedings were had in the fall of 1982. Without question at that time the policy of the Mississippi State Bar was that authority to issue subpoenas was discretionary with the Committee on Complaints. The Committee then had in effect a rule, furnished to Attorney K under the entitlement "Schedule and Procedure For Processing Complaints", which in pertinent part provided:

> No. 10. Complaint Counsel will not issue a subpoena for anyone until a report on this matter is submitted to the Committee on Complaints *and*

the Committee directs Complaint Counsel to issue a subpoena. [Emphasis supplied]

The Bar may no more vest in its Committee on Complaints such discretionary authority to withhold or issue a subpoena than might a circuit or chancery court.

It is undisputed that Attorney K, both verbally and in writing, requested the issuance of a subpoena for the chancery judge whom he is said to have deceived. It is undisputed that no such subpoena was issued and that the chancery judge did not appear before the Committee. It is undisputed and indisputable that this chancery judge was and is a witness crucial to the case.

In this setting we have no alternative but to hold that the proceedings against Attorney K had before the Committee on Complaints, upon the basis of which we are asked to adjudge him guilty of professional misconduct and order a public reprimand, were held in violation of due process rights secured to Attorney K by virtue of the Constitution of the United States and of the State of Mississippi and by Miss.Code Ann. § 73-3-307. The recommendation of the Mississippi State Bar is rejected without prejudice. The matter is referred back to the Committee on Complaints of the Mississippi State Bar for further proceedings not inconsistent with this opinion.[3]

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[3] Much in Attorney K's brief argues that he was further entitled to cross-examine the chancery judge. This is a matter separate from Attorney K's right to compulsory process to secure the attendance of the witness. A party may of right have access to the subpoena power to obtain attendance of many witnesses he has no right to cross-examine but must interrogate via nonleading questions. At rehearing once the chancery

REMANDED TO COMMITTEE ON COMPLAINTS WITHOUT PREJUDICE.

WALKER, C.J., ROY NOBLE LEE and HAWKINS, P.JJ, and DAN M. LEE, PRATHER, SULLIVAN and GRIFFIN, JJ., concur.

ANDERSON, J., not participating.

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judge's attendance has been secured the appropriate bar disciplinary agency will determine under the law and the facts then appearing whether Attorney K may cross-examine.

APPENDIX "2"

IN THE SUPREME COURT OF MISSISSIPPI

RICHARD BARRETT	APPELLANT
VS.	CAUSE NO. 92-BA-0336
THE MISSISSIPPI BAR	APPELLEE

PETITION FOR REHEARING
OR IN THE ALTERNATIVE
MOTION FOR CLARIFICATION OF THE OPINIONS

COMES NOW the Appellee herein, The Mississippi Bar (the Bar), in the above-styled and numbered cause and files this its Petition for Rehearing or in the Alternative Motion for Clarification or Correction of the Court's Opinion and/or various dissenting opinions pursuant to Mississippi Supreme Court Rules 14, 27 and 40 and would respectfully say, in support hereof, as follows, to-wit:

1. That this Court rendered a majority and two dissenting opinions on July 21, 1994 which criticized the Bar for taking almost nine (9) years to prosecute the instant case.[1]

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[1] The majority opinion made the following comments which are true but not entirely complete or accurate in its ruling:

A. More than five years later, the Bar filed a Formal Complaint against Barrett charging him with violating the Mississippi Code of Professional Responsibility. The original complaint was filed on August 19, 1982 under the "old" disciplinary system which permitted public reprimands to be

2. The Court's reference to "taking on almost nine (9) years to prosecute" the instant case is not clear nor

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imposed by the Committee on Complaints. On May 17, 1983 the Committee issued a notice to Mr. Barrett advising him of its intention to issue a public reprimand concerning such informal complaint. As was his right, Mr. Barrett appealed that decision to this Court with such "appeal" being assigned Cause No. 138. (Ruling p. 6).

B. Trial dates were set for August 30, 1989, September 5, 1989, December 8, 1989, March 14, 1990 and May 23, 1990. (Case was not set for trial on March 14, 1990. Instead an Order was entered on March 14, 1990 setting trial for May 23, 1990.) (Ruling p. 6).

In addition, the two (2) dissenting opinions made the following comments which again are not entirely true or accurate.

C. Due process and fundamental fairness require that an attorney not be called upon in 1991 to defend against a complaint filed in 1982, when no good reason is shown for the Bar's delay. (Dissent, Justice Lee, p.1)

D. No good can come from the Court allowing the State Bar to "sit on a complaint against an attorney for almost nine (9) years." (Dissent, Justice Lee, p. 2)

E. Regrettably, the only way to create an effective incentive for the Bar to act seasonably is to reverse sanctions imposed after an unreasonable delay. (Dissent, Justice Lee, p. 3)

F. Barrett argues the burden of proof rests with The Mississippi Bar in showing that there was good cause for the close to nine (9) year delay. (Dissent, Justice McRae, p. 2)

G. Because the Bar did not show any good cause for the extended period of time, Barrett should not have to defend himself in an action that is nearly nine (9) years old. (Dissent, Justice McRae, p. 3)

was it the subject of Appellant's Motion to Dismiss since he alleged that Rule 8.1, Rules of Discipline, had been violated because trial of the instant cause (not its predecessor Cause No. 138) had not been held in accordance with Rule 8.1.

3. In order to adequately explain the history of this case over the nine (9) year time span referred to by this Court is attached hereto a "Chronology of Pertinent Events" which summarizes what has occurred. Perhaps, the most significant event in this list of pertinent events is July 16, 1986, the date of this Court's first opinion concerning the instant factual situation. Although cited at two (2) separate places in the most recent opinions (at pages 13 of the majority opinion and page 2 of Justice Lee's dissent) this Court's previous opinion in the *Attorney K v. Mississippi State Bar Ass'n*, 491 So.2d 220, 222 (Miss. 1986) was apparently not recognized as involving the same factual situation as is involved with the most recent opinions.[2]

In its *Attorney K* decision, this Court reversed the Committee's decision and remanded the complaint to the Committee on Complaints.[3] The effect of this remand was

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[2] *Attorney K v. Mississippi State Bar Ass'n* was decided on a procedural issue of due process and did not directly address the merits involved with the case.

[3] Committee on Complaints is now known, by Court order, as the Committee on Professional Responsibility of The Mississippi Bar.

the required investigation had to begin anew with the filing of an information and belief complaint.[4]

After review by both the Board of Bar Commissioners and the Committee on Professional Responsibility, it was decided that the misconduct alleged in the *Attorney K* case was serious enough to warrant the filing of an information and belief complaint which resulted in the filing of same by the Bar's General Counsel on October 14, 1986.

4. Once the information and belief complaint was filed, it proceeded to the investigatory stage of the disciplinary process. As the entries in the Chronology of Events demonstrate, it was difficult to arrange convenient times and dates for the two witnesses, one who was the sitting Chancellor and the other who was the former Special Chancellor who was not subpoenaed in the *Attorney K* case and resides outside of Jackson, to be extensively and thoroughly interrogated by Mr. Barrett.[5] Unfortunately, it took over a year and a half to complete these two witnesses' testimony as well as the other witnesses Mr. Barrett wanted to question in addition to the Bar asking Mr. Barrett questions when he testified in his own defense.[6]

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[4] As the Chronology of Pertinent Events demonstrates, Mr. Barrett, following the rendering of the *Attorney K* decision, asked the Committee to reconsider "dismissing" the complaint previously filed against him in Cause No. 138.

[5] Transcripts of the various sessions of the investigatory hearings encompass five volumes of testimony and exhibits.

[6] Right or wrong, the Bar's counsel allowed Mr. Barrett to conduct extensive questioning of the witness who was not

5. After the investigation was completed, a report had to be prepared and forwarded to Mr. Barrett and the Committee for their consideration. The report was prepared. Mr. Barrett responded to the report raising several legal and constitutional issues. The Committee then met less than thirty (30) days after the report was submitted to them and approximately fifteen (15) days after Mr. Barrett's response to the Bar's report was received by the Committee. Subsequently, the Committee issued its decision by directive letter to the Bar's General Counsel dated November 4, 1988 and received by the Bar on November 7, 1988. In accordance with the applicable Rule of Discipline, specifically Rule 7.3, the Bar filed the Formal Complaint in this instant case on December 5, 1988. The Court's decision in this case as well as the Chronology of Events attached hereto sufficiently describes what the sequence of events was after the instant Formal Complaint was filed. However, the Bar cannot locate an Order Setting Trial Date for March 14, 1990 as set forth in the Court's instant Opinion. Instead, the Bar did locate an Order entered on March 14, 1990 setting trial date for May 23, 1990.[7]

6. The Court's Opinion states that the "Tribunal continued this case four times before reaching the merits." (Court's Opinion, p. 6). The Opinion goes on to

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allowed to be subpoenaed in the *Attorney K* case when this case was referred back to him for additional investigation.

[7] A review of the Supreme Court Clerk's "Appellate Court Tracking System" docket sheet reflects an Order entered on March 14, 1990 setting trial for May 23, 1990 but no Order setting trial for March 14, 1990.

list five trial dates in support of the aforequoted statement, said being August 30, 1989, September 5, 1989, December 8, 1989, March 14, 1990 and May 23, 1990. This apparent discrepancy is one of the areas that the Bar is asking the Court to clarify.

7. Although not specifically stating so in its Opinion, the clear inference is the responsibility for these continuances lies with the Bar. Consequently, a closer review of the reasons for such continuances is necessary.[8]

(1) The August 30, 1989 trial date was set by mistake since one of the Complaint Tribunal members could not be available on that day.[9]

(2) The trial was rescheduled for six (6) days later on September 5, 1989. The September 5, 1989 trial was continued because the Assistant General Counsel who was assigned to try this case was pregnant at that time and subsequently delivered her first child prior to the beginning of the trial. The Bar respectfully submits that the pregnancy and subsequent delivery of Assistant General Counsel's first child constituted "good cause" for

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[8] The record reflects that the Bar filed a Motion to Set Trial Date on April 18, 1989 advising the Tribunal that the 180 day period would run on June 5, 1989. Nevertheless, the Tribunal did not rule on the Bar's Motion until July 21, 1989. While not criticizing the Tribunal for failing to set this matter for trial before June 5, 1989, the Bar asks the Court to take judicial notice that trial dates cannot be set by the parties alone.

[9] The Order resetting trial was entered on July 26, 1989 well in advance of August 30, 1989 indicating the trial was set by mistake.

continuance of the September 5, 1989 trial of the instant matter.

(3) The trial was then rescheduled for December 8, 1989 but again had to be continued because of the unavailability of Judge Bridges.

(4) The next trial setting was May 23, 1990 which was set through entry of an order on March 14, 1990. It was at this May 23, 1990 hearing that Mr. Barrett was incapable of proceeding even though he did not make a motion for a continuance nor did the Bar move to continue the case. Therefore, any "delay" after May 23, 1990 is a result of Mr. Barrett's condition or actions. In addition, at the May 23, 1990 hearing, Mr. Barrett was instructed by the Tribunal's Presiding Judge to keep Bar counsel advised of his medical and physical condition so that the trial could be rescheduled as soon as possible.

Subsequently, on June 9, 1990 Mr. Barrett advised Bar counsel, by letter, that he objected to the procedure established by the Presiding Judge which was for Mr. Barrett to notify Bar counsel of his medical and physical condition and then Bar counsel was to submit reports of Mr. Barrett's medical and physical condition to the Presiding Judge. In response, Bar counsel by letter dated June 15, 1990 advised Mr. Barrett to send his periodic status reports pertaining to his medical and physical condition to the Presiding Judge with copies to the other members of the Tribunal and Bar's General Counsel. General Counsel's letter concludes: "I will be glad to abide by whatever decision the Tribunal makes with regard to the rescheduling of this matter on a date that is available to all parties."

Mr. Barrett rejected Bar Counsel's suggestion by letter dated June 30, 1990 wherein he stated as follows:

> " . . . I feel constrained to respectfully adhere to the Judge's oral suggestion . . . I (will submit the statement on my medical condition to you for you to circulate it to the Tribunal, if need be."

The medical report referred to by Mr. Barrett on June 30, 1990 was a separate letter from Mr. Barrett dated that same date on Mr. Barrett's letterhead which read as follows:

> "Dear Mike:
>
> Judge Dale asked me to write you about my medical condition. The cast on my leg has been removed, but the bone has not healed as yet. I must keep the limb elevated in connection with the circulation problems and strictly limit activity.
>
> I still experience pain, am on crutches and as much as possible, staying home to mend. I have a doctor's appointment again in a few weeks and will update you further as I am advised.
>
> With regards,
> Sincerely,
> Richard Barrett"

No subsequent medical or status reports were received from Richard Barrett by the Bar's General Counsel.

8. After not hearing from Richard Barrett for a protracted period of time, the Bar, by March 6, 1991, but

probably well before that date[10], started to make arrangements to reschedule the trial. An Order Resetting Trial for May 3, 1991 was executed by the Presiding Judge on behalf of the Complaint Tribunal on the Tribunal's Motion on March 21, 1990 and filed with the Clerk on March 25, 1991. The "delay" from May 23, 1990 to May 3, 1991 was solely attributable to Mr. Barrett's medical and physical condition as well as his failure to abide by Judge Dale's "suggestion" to send the Bar's General Counsel periodic reports concerning his medical and physical condition.

9. Trial was ultimately held concerning this matter on May 3, 1991.

10. The Bar respectfully asks this Court to take judicial notice that certain administrative steps need to be implemented to avoid delays in the scheduling and rescheduling of trials. For example, terms of "Court" for

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[10] The usual procedure is for Bar Counsel to contact the Presiding Judge for available dates. Next, we contact the Respondent or attorney representing the Respondent to try and match available dates. Next, we contract the other members of the Tribunal to try and schedule a convenient date with all involved. When, and if, this is accomplished, we contact everyone and confirm the date. Then, an Order Setting Trial Date is sent to the Presiding Judge for his signature. Upon its return, the Bar files the Order with the Clerk. Then, the Bar sends a copy of the "Clerk-stamped" Order to the Tribunal members and the parties. However, if none of the dates originally given by the Presiding Judge are available, then, the Bar counsel starts the process all over again. Obviously, quite a few telephone calls are involved. Likewise, the time it takes to contact all of the individuals can vary from several hours to several days or weeks.

the Tribunals may need to be established. A "Court Administrator" may need to be appointed to help schedule disciplinary trials just as Court Administrators are currently available and performing similar services for Chancellors and Circuit Court Judges.

11. Notwithstanding the opinions rendered in this case, the Bar respectfully submits that it is only responsible for the "delay" between September 5, 1989 and December 8, 1989 for trial of this case. On April 18, 1989 when the Bar filed its Motion to Set Trial Date it tacitly expressed its readiness to proceed to trial prior to June 5, 1989. Nevertheless, the Tribunal did not rule on such Motion until July 21, 1989 and set trial for August 30, 1989. Such "delay" cannot be attributable to the Bar unless the Bar had the authority to set the trial prior to June 5, 1989 regardless of what whether such dates were available with the Tribunal members and Mr. Barrett. The answer to this statement is so obvious as to border on disrespect, at worst, and ignorance of who has the authority to set cases for the Tribunal, at best.

12. the next "delay" was from August 30, 1989 to September 5, 1989. These six (6) days were a result of a mistake in the availability of one of the Tribunal members. This "delay" is minuscule and if responsibility must be laid somewhere, the Bar will take it. Regardless, the reason for the delay was discovered very quickly and a resetting was secured expeditiously.

13. The next "delay" was from September 5, 1989 to December 8, 1989. Again, this "delay" was the responsibility of the Bar. Nevertheless, the reason for the continuance qualifies as a "good cause" since the birth of a child is a cause to celebrate.

14. The next "delay" from December 8, 1989 to May 23, 1990 resulted because of the busy schedule of Judge Bridges and the various Complaint Tribunals members and counsels involved. Evidencing the "good faith" of the Bar in trying to get this case reset is the entry of an Order Setting Trial Date filed in March 1990 for a trial to be held approximately 2½ months later. The Bar is not responsible for this continuance nor should it be criticized that it took from December 8, 1989 until May 23, 1990 to reschedule trial in this case.

15. The last delay from May 23, 1990 to May 3, 1991 cannot be held to be the responsibility of the Bar. Clearly this responsibility lies with Mr. Barrett. The Bar will concede that just as pregnancy constitutes "good cause", falling off a roof and being seriously injured constitutes "good cause". What doesn't constitute good cause is Mr. Barrett's failure to abide by the Presiding Judge's suggestion for him to keep the Bar advised about his physical and medical condition. He did not comply with this suggestion and his failure to deserving of this Court's criticism, if the Court determines, after reviewing this Petition for Rehearing, that the criticism of the Bar previously included in its Opinions is still warranted. The Bar is just as interested, if not more so, in a speedy trial and just resolution of charges of professional misconduct as anyone who is involved with the disciplinary process. The history of the Bar in disciplinary proceedings is the

Bar doesn't ask for continuances, except for "good cause", in very many cases. The problem lies in getting the cases set and reset for trial. The Bar needs help in this regard.

16. Finally, the facts present in this case do not support the various criticisms referred to herein which are included in the cited Opinions rendered in this case, such as, characterizing the Bar's prosecution of this case as "sitting on a case for almost nine (9) years". Every lawyer and the Bar is worthy of respect until he or she proves otherwise. Justified criticism is fine. Constructive criticism is welcome. However, criticism should only be included in court opinions when same is supported by the facts involved and where warranted. The instant case is not such a situation.

In conclusion, the Bar respectfully submits that certain statements included in the various opinions rendered in this case should be deleted, clarified or reworded to reflect factually supportable statements.

Respectfully submitted,

THE MISSISSIPPI BAR

BY: /s/ Michael B. Martz
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CERTIFICATE OF SERVICE

I, Michael B. Martz, do hereby certify and attest that I have this date mailed a true and correct copy of the foregoing instrument to the Honorable Richard Barrett, at his last known business mailing address of P.O. Box 2050, Learned, Mississippi 39154 and to each Complaint Tribunal member assigned to this matter.

CERTIFIED, this the 2nd day of August, 1994.

/s/ Michael B. Martz
Michael B. Martz

CHRONOLOGY OF EVENTS

1. *July 16, 1986* – Supreme Court's Decision reversing Public Reprimand imposed upon Richard Barrett in Cause No. 138. (See *Attorney K v. Mississippi State Bar Association*, 491 So.2d 220 (Miss. 1986))
2. *July 18, 1986* – Letter from Barrett to former General Counsel, Andy Kilpatrick asking the Committee to dismiss the original complaint.
3. *Between July 16, 1986 and September 11, 1986* – Memo from Mike Martz to Board of Bar Commissioners reporting Supreme Court's decision in the *Attorney K* case.
4. *September 19, 1986* – Memo from Assistant General Counsel, Connie S. Jelliffe to Committee on Professional Responsibility for Committee's decision concerning whether an information and belief complaint should be filed against Mr. Barrett.
5. *September 19, 1986* – Committee meets and directs General Counsel to file an information and belief complaint against Barrett in this case.
6. *October 14, 1986* – Informal complaint filed against Mr. Barrett.
7. *October 16, 1986* – Notice given to Mr. Barrett that an informal complaint has been filed against him in this matter and that he has until October 31, 1986 to file a response to the complaint.
8. *October 27, 1986* – Mr. Barrett requests twenty (20) additional days to file his response to the informal complaint.
9. *November 5, 1986* – The Bar grants Mr. Barrett's request for additional time and re-establishes due date of November 20, 1986.

10. *November 13, 1986* – Mr. Barrett files his response to the informal complaint.
11. *November 21, 1986* – Committee meets and orally refers the instant informal complaint to General Counsel to conduct an investigatory hearing.
12. *December 17, 1986* – Committee sends letter to General Counsel to conduct investigatory hearing into this matter.
13. *March 10, 1987* – Notice of investigatory hearing scheduled for March 25, 1987.
14. *March 17, 1987* – Letter from Barrett requesting the March 25, 1987 hearing be continued until April 13, 1987.
15. *March 19, 1987* – Investigatory hearing to take Robert McFarland's testimony scheduled for April 13, 1987.
16. *April 13, 1987* – Investigatory hearing began but not concluded; rescheduled for July 29, 1987.
17. *July 29, 1987* – Investigatory hearing reconvened with regard to this case but not completed.
18. *August 18, 1987* – Notice that the investigatory hearing would be reconvened on September 17, 1987 in Judge McFarland's office in Bay Springs, Mississippi.
19. *September 8, 1987* – Letter confirming September 17, 1987 reconvening of investigatory hearing.
20. *September 9, 1987* – Letter from Judge McFarland to Ms. Jelliffe confirming his availability on September 17 and September 21.
21. *September 17, 1987* – Investigatory hearing reconvened in Judge McFarland's office but not completed.

22. *September 21, 1987* – Letter from Barrett to the Bar indicating that Mr. McFarland apparently forgot to schedule enough time to complete the investigatory hearing and Mr. Barrett requested a subpoena be issued for Mr. McFarland to produce all documents related to the McPhersons, Mr. Bridges or any other person directly or indirectly related to the subject matter of the informal complaint.
23. *October 28, 1987* – Letter from the Bar to Mr. McFarland indicating that his examination would be reconvened on December 1, 1987.
24. *November 3, 1987* – Letter from the Bar to the Chairman on the Committee on Professional Responsibility asking that the deadline to conduct the investigatory process be completed and extended an additional forty-five (45) days.
25. *November 4, 1987* – The Committee grants an additional forty-five (45) days to complete investigation.
26. *November 19, 1987* – A letter from the Bar to Mr. Barrett confirming reconvening of investigatory hearing for December 2, 1987 to conclude Judge McFarland's testimony.
27. *November 20, 1987* – A letter from Mr. Barrett notifying that the date he recalled was December 1, 1987 not December 2, 1987.
28. *December 1, 1987* – Hearing reconvened but not completed.
29. *December 7, 1987* – Letter from Barrett indicating that the hearing could be reconvened on or about January 8, 1988.
30. *December 16, 1987* – Letter from the Bar to Mr. Barrett indicating an attempt to schedule a convenient time to take Judge Bridges' testimony during January or February 1988.

31. *December 31, 1987* – Note from Judge Bridges that he would available during the week of February 1, 1988.
32. *January 5, 1988* – Letter from the Bar to Judge Bridges asking when he would be available to be deposed in this proceeding.
33. *January 7, 1988* – Copy of transcript of December 1, 1987 hearing provided to Barrett by the Bar.
34. *January 14, 1988* – Notice that the hearing will reconvene on March 8, 1988.
35. *January 14, 1988* – Letter to Chancellor Bridges notifying him that his testimony will be taken on March 8, 1988.
36. *January 18, 1988* – Letter from court reporter to Mr. Barrett providing signature page executed by Mr. McFarland.
37. *February 4, 1988* – Request from Mr. Barrett to have available several different court files for his use at the investigatory hearing.
38. *February 8, 1988* – Letter from the Bar to Mr. Barrett in response for production of court files.
39. *February 12, 1988* – Letter from Barrett to the Bar re: production of court files.
40. *February 17, 1988* – Letter from Bar to Barrett advising him arrangements have been made to have court files available on March 8, 1988.
41. *February 22, 1988* – Letter from the Bar to Mr. Barrett re: production of court files.
42. *February 26, 1988* – Letter from Barrett to the Bar asking for a copy of the Rules of Discipline pursuant to which this matter was brought.

43. *March 8, 1988* – Hearing reconvened to take Judge Bridges' testimony. Hearing not concluded on this date.
44. *March 10, 1988* – Letter to Chancellor Bridges asking about his availability on April 7, 1988 to conclude his testimony.
45. *March 12, 1988* – Letter from Barrett to the Bar indicating that he anticipates a full day if necessary to examine Judge Bridges and reserves the right to a full day's hearing.
46. *April 7, 1988* – Hearing reconvened to continue taking the testimony of Judge Bridges by Mr. Barrett.
47. *May 17, 1988* – Request from the Bar to the Chairman of the Committee on Professional Responsibility for a forty-five (45) day extension to prepare a report in this complaint.
48. *May 18, 1988* – Committee grants 45 days to complete investigation.
49. *June 20, 1988* – The Bar's request for extension of time until July 15, 1988 to complete its investigation because of lack of clerical assistance and the transcript (court reporter hired by the Bar was no longer in practice) resulted in the reports not being put in final typed form. Request granted. Additional requests were made and granted.
50. *September 22, 1988* – Report sent to the Committee on Professional Responsibility and Mr. Barrett.
51. *September 29, 1988* – Letter from Mr. Barrett to the Bar objecting to further time extensions. Also included was his response to the investigatory report.

52. *October 14, 1988* – Committee met and decided probable cause existed for the filing of a Formal Complaint.
53. *November 4, 1988* – Letter from the Committee on Professional Responsibility to the Bar to file a Formal Complaint. Letter received on November 7, 1988.
54. *December 5, 1988* – Formal Complaint in the instant cause filed.
55. *December 7, 1988* – Complaint Tribunal appointed.
56. *December , 1988* – Process served.
57. *December 27, 1988* – Barrett requests additional time to answer.
58. *February 9, 1989* – Barrett submits the request for additional time to file answer.
59. *February 20, 1989* – Barrett notifies Bar that his Answer will be filed in the "next day or so."
60. *February 22, 1989* – Barrett's Answer filed in this cause.
61. *April 18, 1989* – The Bar filed a Motion for Trial Setting.
62. *May 5, 1989* – Bar notified that Presiding Judge cannot set trial before July.
63. *July 11, 1989* – Tribunal signed an Order Setting Trial for August 30, 1989.
64. *July 20, 1989* – Bar notifies Tribunal of problem with the August 30, 1989 trial date.
65. *July 21, 1989* – Order Setting Trial Date for August 30, 1989 signed indicating lack of notice of problem setting trial.

66. *August 30, 1989* – Trial continued because of the inability of one Tribunal member to attend trial. Trial re-set for September 5, 1989.
67. *Approximately August 31, 1989* – Assistant General Counsel assigned to try this case delivers her baby. Case continued. Case rescheduled for December 8, 1989. However, because of the unavailability of Judge Bridges the case was continued with no specific date mentioned for re-trial.
68. *October 11, 1989* – Order entered re-setting trial for December 8, 1989.
69. *October 27, 1989* – Notice to the Tribunal and Mr. Barrett that Judge Bridges has an out-of-town committment. Trial had to be rescheduled.
70. *October 31, 1989* – Motion for Continuance filed.
71. *November 10, 1989* – Order entered continuing case from December 8, 1989 to an indefinite date.
72. *March 13, 1990* – Bar sends proposed Order Setting Trial Date to Tribunal.
73. *March 14, 1990* – Case re-set for May 23, 1990.
74. *March 26, 1990* – Barrett filed Motion to Dismiss.
75. *April 10, 1990* – Bar responded to Barrett's Motion to Dismiss.
76. *May 23, 1990* – The Bar appeared ready to proceed to trial. However, Mr. Barrett appeared in hospital clothes and in no condition to try the case. He did not make a motion for a continuance which caused the Tribunal to continue the case on its own motion.
77. *May 23, 1990 through March 20, 1991* – No indication from Mr. Barrett that he had recovered from his injuries or that he was ready to proceed to trial.

78. *March 21, 1991* – Order entered on motion of the Tribunal resetting the case for trial for May 3, 1991.
79. *May 3, 1991* – Case tried.

Documents supporting entries listed have *not* been attached hereto because of their voluminous nature. However, documents to support these entries will be produced upon request of the Court. Time gaps are not mentioned herein except where supporting documents were readily available to support the entries. However, such document can probably be located upon further search if the Court deems same to be pertinent to reconsideration of the Petition for Rehearing.